No. 21,340

In the

United States Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY,
Appellant,

vs.

C. R. SMITH (Successor), SECRETARY OF COMMERCE, STATES STEAMSHIP COMPANY and SAN DIEGO UNIFIED PORT DISTRICT,
Appellees.

Petition of Matson Navigation Company for Rehearing with Suggestion of Rehearing En Banc

ALVIN J. ROCKWELL
JOHN E. SPARKS
THOMAS A. WELCH
BROBECK, PHLEGER & HARRISON
111 Sutter Street
San Francisco, California 94104

WILLIS R. DEMING
100 Mission Street
San Francisco, California 94105

GEORGE D. RIVES
RIVES & RODGERS
Public Service Building
Portland, Oregon 97204

Attorneys for Petitioner
Matson Navigation Company

June 14, 1968.

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

No. 21340

In the

United States Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY,
Appellant,

vs.

C. R. SMITH (Successor), SECRETARY OF COMMERCE, STATES STEAMSHIP COMPANY and SAN DIEGO UNIFIED PORT DISTRICT,
Appellees.

Petition of Matson Navigation Company for Rehearing with Suggestion of Rehearing En Banc

To the Honorable Ben Cushing Duniway and Walter Ely, Circuit Judges, and William M. Byrne, District Judge:

I.

Pursuant to Rule 23 of the Rules of this Court, Appellant Matson Navigation Company respectfully petitions for rehearing, and further petitions or suggests that the rehearing be *en banc*.

The correct application of Section 805(a) of the Merchant Marine Act, 1936 (46 U.S.C. § 1223(a)) (the Act),[1] is of vital importance to the few remaining operators, like Matson, of unsubsidized, ocean-borne freighter operations in domestic commerce.[2] The Act provided a comprehensive system of construction and operating subsidy benefits, including tax deferral privileges, for American flag operations in foreign commerce (46 U.S.C. §§ 1151-1183, 1177(h)). Such benefits and privileges were logically not extended to domestic operations, from which foreign flag vessels are excluded. As the court below correctly noted, "another important purpose of the Act was to promote the maintenance of an unsubsidized, privately-owned merchant fleet sufficient to carry the nation's 'domestic water-borne commerce'" (258 F.Supp. 144, 151).

Section 805(a) of the Act was intended primarily to further the latter objective. Subsidy and tax support had their place in the battle against foreign-flag competition; they had no place in the domestic service, as against unsubsidized operations.[3] The decisions of the United States Maritime Commission and its successors for many years after 1936 meticulously applied Section 805(a) in accordance with its plain terms and purpose, holding subsidized

---

1. Record references and abbreviations sometimes used are as designated in Matson's brief of May 2, 1967 (MB) and Matson's reply brief of August 14, 1967 (MRB).

2. Others include Sea-Land Service, Inc. and Seatrain Lines, Inc. (Puerto Rico) and Alaska Steamship Co. (Alaska).

3. Generally, as to the legislative history, see MB 20-24. The present case presents a so-called mixed voyage situation wherein States Steamship Company received permission, which has not been stayed pending judicial review, to call its subsidized trans-Pacific vessels at Hawaii in domestic commerce with the Mainland on an additional 13 voyages in each direction yearly (permission for the first 13 voyages in each direction having

competition to be *prima facie* unfair competition and prejudicial to the objects and policy of the Act. This same concern for the protection of domestic commerce is manifested in two decisions, involving the Puerto Rico trade, of former Secretary of Commerce Hodges as late as 1964. (MB 24-26.)

The break with this line of precedent can probably be attributed to the unfortunate decision in *Pacific Far East Line, Inc. v. Federal Maritime Board,* 275 F.2d 184 (D.C. Cir. 1960), certiorari denied, 363 U.S. 827.[4] In the instant case the Secretary designed what the Court below correctly called "a new standard or test of 'substantial competitive advantage' " (258 F.Supp. at 149).

Aside from the *PFEL* and *Seatrain* cases, *supra,* we are not aware of the decision of any other Court of Appeals dealing with Section 805(a). The instant case presents the Section to this Court for the first time. This Court's *per curiam* affirmance, after many months of deliberation, on the reasoning of the lower court's opinion leaves unanswered crucial questions in the application of Section 805(a) to the present and future cases (note 6, *infra*).

---

previously been granted and not in issue). The suggestion in the Government's Brief (pp. 34-36) that this was not the kind of situation thought to give rise to prior abuses does not survive examination. For example, one of the asserted abuses uncovered by the Postmaster General and before Congress in 1935 was the former Dollar Company's domestic intercoastal service segment of its subsidized around-the-world service. *Investigation of Air Mail and Ocean Mail Contracts,* Senate Committee Print for the Special Committee to Investigate Air Mail and Ocean Mail Contracts, Part 1, 75th Cong., 1st Sess. 225, 228 (1935).

4. Hereafter referred to as "the *PFEL* case". There the Court of Appeals, in a case involving a separate domestic service with unsubsidized vessels, stated that the Board had found *no* subsidy support, whatsoever, for the proposed domestic service and, therefore, it concluded there was no "unfair competition" under Section 805(a). However, the court further stated that unfair competition would result from the use of subsidy to "carry the loss" incurred in an unprofitable domestic service (275 F.2d at 186). In a later case, the same court construed "the obvious purpose" of Section 805(a) to be "to preclude having any part of the subsidy aid the domestic operation, for which no subsidy is available, and to prevent an advantage for one carrier to the detriment of his domestic competitors." Seatrain Lines, Inc. v. Hodges, 320 F.2d 737, 740 (D.C. Cir. 1963) (dictum), *rehearing denied en banc.*

We submit, with all deference, that this Court has the opportunity and obligation to resolve these issues.

A brief summary of two of these issues and of their disposition will demonstrate, we believe, both the public importance of the questions presented and the deficiencies in the treatment so far accorded them.

II.

A. In ascertaining in a mixed voyage situation, such as here, the presence and extent of subsidy support of the domestic operations by the subsidized, foreign operations, is it essential to apply full absorption (fully-allocated) cost accounting?

1. The answer has to be Yes, as a matter of law, and applying this accounting test to the undisputed facts, the 26-voyage domestic operation is shown to run up a loss of approximately $1,000,000 annually.[5]

2. Matson argued that the Secretary accepted the necessity of fully allocated cost accounting and a loss in the range of $1,000,000 annually. (MRB 3-4.) The Government and States disagree, and both have vigorously maintained that the Secretary did not hold (1) that is was necessary to apply fully-allocated cost accounting, (2) that the domestic operation would incur a loss, or a loss in any particular amount or range, or (3) that it was necessary to consider *any* question of cost allocation in order to decide the case. (GB 11-12, 13-15, 46-51; SB 20-22.)

3. The District Court did not resolve these crucial questions. It can hardly be claimed that the District Court perceived the importance Matson attaches to fully-allocating the costs of carrying the domestic cargo, or the financial consequences in loss and

---

5. This domestic service loss is made up from the concurrent foreign operations that are a part of the same 26 voyages. But the entire 26 voyages operate at a loss without subsidy, which, after all refunds and reductions, amounts on the 26 voyages to some $3,600,000 annually. Q.E.D., the domestic operation is supported by subsidy to the tune of, in round figures, $1,000,000 annually. (MB 3-4; MRB 7-8). The District Court's footnote 7 (258 F.Supp. at 149), in its treatment of "residual subsidy", unhappily demonstrates the failure of Matson's counsel to convey the true situation as to subsidy support.

necessary subsidy support. (258 F.Supp. at 150 (first full para.) 154 *(ibid.)*, 155-156; GB 13-15; SB 22.)

4. Can this and similar cases logically be decided unless it is determined whether and what method should be employed to determine the financial results of the domestic operations and the consequent degree of any subsidy support?[6] This Court's *per curiam* affirmance leaves the matter at large. Does this Court believe that it is necessary to analyze the financial results of transporting the domestic cargo, or that this can be done without applying an accounting method? If not, what does it believe to be the right approach?

B. The Secretary's new test of "substantial competitive advantage" contemplates that the amount of subsidy support diverted to the domestic operation is to be balanced against various "equalizing forces" and related factors. (SD 69, pp. 52-53.) If the Secretary made no finding as to the amount of States' loss on the domestic cargo (and the consequent amount of subsidy support), how could he apply the balancing exercise?

1. We contend that the Secretary was bound as a matter of law to determine, at least approximately, the amount of subsidy support, and we further submit that subsidy support to the extent of anything approaching $1,000,000 annually requires denial of Section 805(a) permission. The Congress that enacted the 1936 Act and its successors, which have reviewed Section 805(a) many times without change, would surely be aghast at any clearly stated expression to the contrary.

---

6. This Court may take official notice of the fact that the Maritime Administration/Maritime Subsidy Board of the Department of Commerce has pending before it, or has recently decided with judicial review pending, Special Dockets S-191, S-200, S-205 and S-211, all of which involve the question of whether the financial results of domestic trade operations by subsidized operators or their affiliates will result in prohibited support from subsidy paid for foreign trade operations. And for a discussion of the threat of the intrusion of subsidy into the domestic trades see the testimony of John Mason, attorney for Sea-Land Service, Inc., before a Subcommittee of the House Merchant Marine and Fisheries Committee May 15, 1968. Cong. Information Bureau, Vol. 72, No. 96, pp. 7, 10-15.

2. But, passing this, and applying the Secretary's own test (SD 69, pp. 41-43, 52-54), how is it possible to balance subsidy support against "equalizing forces" if the amount of subsidy support is unknown? The District Court had no answer to this question (258 F.Supp. at 155-56), and the only possible answer is that a balancing exercise in these circumstances is impossible under the laws both of subsidy and gravity. In a recent case the Supreme Court concluded that the District Court had erroneously appraised the factor to be placed on one side of the scales in a weighing process suggestive of that invoked by the Secretary here. The Court concluded:

> "To weigh adequately one of these factors against the other requires a proper conclusion as to each. Having decided that the court below erred in assessing competitive impact, we should remand, so that the District Court can perform again the balancing process mandated by the Act." *United States v. Third Nat. Bank*, 19 L. Ed.2d 1015, 1025 (March 4, 1968) (footnote omitted).

3. We submit that this Court should speak its mind on this matter, and, at the least, follow the course of the Supreme Court in remanding.

CONCLUSION

For these reasons, a rehearing should be granted, we suggest, *en banc*.[7]

Respectfully submitted,

ALVIN J. ROCKWELL
JOHN E. SPARKS
THOMAS A. WELCH
BROBECK, PHLEGER & HARRISON

WILLIS R. DEMING

GEORGE D. RIVES
RIVES & RODGERS

Attorneys for Petitioner
Matson Navigation Company

June 14, 1968.

---

7. Should rehearing be granted *en banc*, we would expect to reargue a limited number of other issues in the case not reviewed in this petition.

CERTIFICATE OF COUNSEL

I certify that the foregoing petition, in my judgment, is well founded, and that the same is not interposed for delay.

ALVIN J. ROCKWELL

Attorney for Matson Navigation Company